IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 20, 2008

STATE OF TENNESSEE v. KIMBERLY C. HODGE

Direct Appeal from the Circuit Court for Lawrence County
No. 24246 Stella L. Hargrove, Judge

No. M2007-00940-CCA-R3-CD - Filed March 25, 2009

The Defendant-Appellant, Kimberly C. Hodge (hereinafter "Hodge"), was convicted by a Lawrence County jury of theft of property valued over $60,000. She received a ten-year sentence to be served in the Tennessee Department of Correction. In this appeal, Hodge raises the following issues for our review: (1) whether the evidence is sufficient to support her conviction; (2) whether the trial court erred in denying her motion to suppress, (3) whether the trial court erred in denying her motion to continue; (4) whether the trial court erred in refusing to allow counsel to question prospective jurors regarding the voluntariness of her statement; (5) whether the trial court erred in allowing a lay witness' identification of a handwriting sample; (6) whether the trial court erred in admitting duplicate copies of records; (7) whether the trial court erred in denying her motion for a mistrial; and (8) whether her sentence is excessive. Upon review, we affirm the conviction but modify the sentence to eight years.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Modified in Part

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Robert D. Massey, Pulaski, Tennessee (at trial), and Ryan D. Brown, Columbia, Tennessee (on appeal), for the appellant, Kimberly C. Hodge.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; T. Michael Bottoms, District Attorney General; Joel Douglas Dicus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Hodge was indicted by the Lawrence County Grand Jury for theft of property valued over $60,000 from Crockett Hospital. Hodge later filed a motion to suppress the statement she made to two agents from the Tennessee Bureau of Investigation. The trial court denied her motion to suppress. Hodge then petitioned the trial court to accept her guilty plea in exchange for eight years

of probation and payment of restitution in the amount of $60,000. The trial court rejected the guilty plea agreement. Just before trial, Hodge filed a motion for a continuance, asserting that she was unable to consult with some witnesses, including an expert witness, and was unable to prepare a defense. The trial court denied this motion. Following a three day trial, Hodge was convicted of theft of property valued over $60,000. On January 9, 2006, the trial court sentenced Hodge to ten years of imprisonment as a Range I, standard offender and ordered her to pay $174,497.44 in restitution to Crockett Hospital. Hodge filed a motion for judgment of acquittal and a new trial on January 17, 2006, and an amended motion for a new trial and judgment of acquittal on March 19, 2007. The trial court denied the motion on March 30, 2007. Hodge filed a timely notice of appeal on April 27, 2007.

Trial. Mike Cox, a Special Agent Criminal Investigator with the Tennessee Bureau of Investigation (TBI), testified that although he was assigned to Williamson and Hickman Counties, he was asked to investigate the Kimberly C. Hodge case in Lawrence County on May 30, 2003. He stated that he had been a police officer in the Metro Nashville Police Department for four years, had worked for the TBI for eight years, and had worked for the Federal Bureau of Investigation for one and one-half years before returning to the TBI. Upon his assignment to this case, he called the district attorney's office and was told to speak to John Copeland, the Chief Financial Officer, and Jack Buck, the Chief Executive Officer, at Crockett Hospital about some money that was missing. At the June 4, 2003 meeting with Copeland and Buck, he learned the amount of missing money as well as the manner in which they believed it was taken. All three men reviewed the hospital records regarding the money and discussed the likelihood that Hodge was responsible for embezzling the money. Agent Cox told Copeland and Buck that he would talk to Hodge about the missing funds.

On June 5, 2003, Agent Cox talked to Hodge at the district attorney's office in Lawrenceburg, Tennessee. Hodge was told to talk to Agent Cox following her termination from Crockett Hospital. Hodge drove herself to the district attorney's office, and Agent Cox and Agent Vance Jack interviewed her. The two agents explained why they wanted to talk to her and began the interview. They advised her of her Miranda rights and allowed her to read the waiver form entitled "Tennessee Bureau of Investigation Warning As to Constitutional Rights." Hodge initialed and signed her name showing that she understood her rights, and Agents Cox and Jack also signed this waiver. The original waiver, which indicated that it was signed by Hodge and the two agents at 10:30 a.m. on June 5, 2003, was admitted into evidence.

During the interview, Agent Cox determined that Hodge could read and understood her rights. He did not make any promises to her regarding the possibility of prosecution. Once Hodge signed the waiver, he began the interview, starting with background information, showing her some of the records regarding the missing money. He showed her each transaction where there was missing money, and then Hodge admitted that she had taken the money. Agent Cox was able to reduce Hodge's statement to writing by typing on a laptop as she talked. He read the statement to Hodge as she talked, and Hodge told him to change things that were not correct. At the conclusion of the interview, Hodge signed the statement, and Agent Cox initialed the statement.

Agent Cox then read Hodge's statement to the jury, which stated, in part:

In June of 2000, I embezzled money from the hospital for the first time. I took a check that was part of the hospital checking account, that was made payable to Willis Carone, for thirty-eight hundred dollars ($3,800) and erased his name from the original check.

I typed my name on the check and, then, endorsed it and deposited it, either in [the] Bank of America savings or checking account.

. . . .

In 2001, I embezzled money three (3) more times, by using the same method of erasing the name off the check and placing my name on the check. I, then, later endorsed the checks and deposited them into Bank of America accounts.

. . . .

After reviewing the actual audit records from the hospital for June [of] 2000 through May of 2003, the actual [sic] thirty-nine (39) illegal transactions, totaling . . . a hundred and forty-two thousand six hundred and eighty-five dollars and seven cents ($142,685.07), that the auditors found, are the illegal transactions that I conducted.

. . . .

There was also another way that I embezzled money. I started doing this in 2002 and 2003. I took deposit slips from the hospital, where they had received payments from customers, and altered the deposit amounts.

I would deposit the money at the Bank of America for the hospital and, then, deposit the difference of the amount that I altered from the original amount into my personal account at Bank of America.

. . . .

After reviewing the actual audit records from the hospital for July [of] 2002 through May of 2003, the ten (10) illegal transactions, totaling ten thousand five hundred and forty-seven dollars ($10,547), that the auditors found are the illegal transactions that I conducted.

. . . .

When I deposited the money into my accounts, most of the time, I used my Bank of America accounts. And I usually dealt with a teller named Adeline, last name unknown.

When I did use SunTrust, I usually dealt with a teller named Bonnie Sanders.

The money that I embezzled has all been spent[,] and there is none of it [sic] left.

My husband or [sic] no other family members knew that I was embezzling the money. I would be willing to do whatever I had [sic] to do to make sure that the hospital was paid back in full. I would also be willing to cooperate in the future with any further investigation concerning this matter

Agent Cox stated that Hodge read the statement before she signed and dated it. At that point, she made no corrections because Agent Cox had already made the changes she requested to the statement. Sometime during the interview, Hodge's family arrived at the office. After she signed the statement, she met with her husband, mother, and father. Agent Cox talked to her family at the end of the interview and told them that the information would be presented to the district attorney's office, and that office would determine whether the case would be presented to the grand jury. Agent Cox stated that prior to giving her statement, Hodge "seemed okay and friendly and personable" but "at the same time, [seemed] somewhat upset." Agents Cox and Jack told her that they would not be arresting her that day. Agent Cox stated that he did not display his weapon, although he commonly wore a gun on his ankle, and that he and Agent Jack did not use any intimidation tactics in order to obtain Hodge's statement.

Agent Cox said that he issued subpoenas to collect bank records. Later, his investigation revealed that the hospital had discovered additional missing funds, which meant that the total amount of money taken increased to $178,092.97. Agent Cox contacted Hodge's attorney at the time and told him that Agent Jack would be setting up a time to talk to Hodge. Agent Jack met with Hodge a second time at her attorney's office regarding the additional missing funds from the hospital. Agent Cox issued additional subpoenas to banks where he believed Hodge possessed bank accounts. As a part of the investigation, Agent Cox and Copeland compiled a book containing records showing the illegal transactions. The book contained a register for the checks, carbon copies of Crockett Hospital checks, deposit slips from the hospital, and bank statements for Hodge's personal checking and savings accounts. This book was compiled for use at trial and was admitted into evidence.

Agent Cox stated that he did not always give the Miranda rights waiver, but he gave it to Hodge in this case because "once I knew she was going to be the target, for sure, I [advised her of] her rights." He also identified a second book containing records relating to Hodge's second scheme for embezzlement, which involved taking cash from the hospital's bank deposits. The book contained deposit slips from the hospital and bank statements from Hodge's personal account at Bank of America. Agent Cox said that his investigation revealed information consistent with Hodge's statement regarding the two methods of embezzlement.

After talking to Copeland and obtaining the statement from Hodge, Agent Cox did not conduct any further investigation to determine whether others were involved in the theft "other than doing a few interviews." He did not look at Copeland's or Buck's bank accounts and did not issue any

subpoenas for documents belonging to management personnel at Crockett Hospital regarding money or overpayments.

Agent Cox stated that he did not believe that Hodge talked to Agent Jack outside his presence prior to or following the interview. There was no video or audio recording made at the time that Hodge gave her statement because "it's not the policy of the TBI to tape. We had two (2) agents present." Agent Cox stated that the typed statement was a summary of Hodge's words to him and Agent Jack. He said he knew of certain situations where TBI used tape recorders during interviews, but he had never seen it done. He did not ask Hodge about whether she had experience with the criminal justice system but felt fairly sure that Hodge did not have a criminal history. When asked about the precise moment that the agents read her rights to her, Agent Cox stated, "We just did an introduction between Agent Jack and [me]. We did, initially, talk about the case, just a little bit. And, then, once we realized that we needed to read her her rights, that's what we did."

Agent Cox said that he did not ask Hodge anything about her mental or physical health during the interview because "she appeared to be perfectly normal." He did not ask her if she had taken any medication at the time she gave her statement or if she had gotten any sleep the night before. He stated, "Primarily, the allegations were not discussed before Miranda. The basic background information about [her] education and her work experience [were] the primary [things] that we discussed before [giving her the] Miranda [warning]."

Agent Cox and Agent Jack first became aware that Hodge's family had arrived at the district attorney's office sometime during the middle of the interview. The agents did not notify her that her family was present. However, they did ask Hodge if she wanted a break or if she needed something to drink. Hodge declined their offers and told them that she wanted to finish the interview.

Jack Vance, an agent with the TBI, testified that he had worked at the Wayne County Sheriff's Department for six years, the Lawrenceburg Police Department for ten years, and the Tennessee Bureau of Investigation for six years. Vance stated that Hodge's statement was taken at the district attorney's office and that Hodge drove herself to the interview. Although he had met Hodge before and knew Hodge's father and husband, Agent Vance reintroduced himself and introduced Agent Cox to her. He then explained the purpose of the interview to her, which he restated during his testimony:

> [A]t that particular point in time, . . . approximately a hundred and fifty-three thousand dollars ($153,000) [had been] taken from Crockett Hospital . . . in two (2) various schemes. Mike Cox – Special Agent Mike Cox was the lead agent on the case, because he was the case agent. And he had the documentation showing the money and how it was taken. And he went over that documentation with her.

Agent Vance said that Hodge was advised of her constitutional rights after they explained the reason for the meeting. Once she was advised of her rights, the agents gave her "the information that [they] had from Crockett Hospital on the monies that were missing from checks and deposits." Agent Vance did not promise to do anything for Hodge in exchange for her statement. He witnessed the statement and helped Agent Cox, who conducted the interview. He was present during the entire interview

between Agent Cox and Hodge and witnessed them both sign the statement. Agent Vance said that he also signed the statement as a witness.

After the interview, Agent Vance talked to Hodge's family about the purpose of the interview. He said, "[Hodge] had become emotionally upset towards the end of the interview. And I tried to console her, just [to say] everything is going to be okay." Vance said that he told her these things "because of a friendship that [he had with Hodge's father,] Mr. Casteel."

Agent Vance said that he participated in the second interview with Hodge on July 10, 2003, at Hodge's attorney's office, for the purpose of determining if Hodge, or someone else, had taken additional funds from the hospital. This second meeting was not recorded. Hodge and her attorney reviewed the hospital documentation regarding these additional missing funds and Hodge "admitted [that she was responsible for] all of them, except [for] a ninety-seven dollar ($97) discrepancy . . . ."

Agent Vance stated that he had asked that Hodge's case be assigned to another agent because of his relationship with Eddie Casteel, Hodge's father. However, once Agent Cox was assigned, Agent Vance said that he assisted in the investigation of this matter. He knew that Hodge did not have a criminal history and would be unfamiliar with the criminal process. Hodge's family arrived "towards the end of [the interview]." There was no audio or video recording of Hodge's interview. When he was asked whether the TBI uses tape-recorded statements, Agent Vance explained, "Only under certain circumstances. We have to get prior approval[,] and it has to meet certain criteria. And I don't think this was one of those cases." He told Hodge's family that he would let the district attorney's office know that she had cooperated in the investigation; however, he did not give Hodge any indication of what effect it might have on her case. Agent Vance said that Hodge started initialing her statement at 10:30 a.m. At the conclusion of Hodge's interview, only Agent Vance, and not Agent Cox, spoke to Hodge's family.

Millie Kay Myers, a Community Bank Executive at Bank of America, testified that between the years of 2000 and 2003, Crockett Hospital and Hodge had accounts with Bank of America. Myers inspected the financial records from Bank of America that were trial exhibits and explained that these records were kept in the regular course of business and were recorded contemporaneously with the transactions. Myers stated that no one from Crockett Hospital helped Bank of America compile its records relating to this case. She identified two checks, No. 180 and No. 181, drawn on Crockett Hospital, made payable to Hodge, endorsed by Hodge, and deposited into the joint account that Hodge shared with her husband. She also outlined Bank of America's internal procedures for handling deposits containing checks and cash.

Brandy Smith Angus, an assistant vice-president and branch manager for SunTrust Bank, testified that she reviewed the records from SunTrust Bank that were trial exhibits. She identified three of the more than forty checks drawn on Crockett Hospital's account that were made payable to Hodge, endorsed by Hodge, and cashed or deposited at SunTrust Bank, with Hodge taking the proceeds. Angus stated that Crockett Hospital and Hodge had bank accounts at SunTrust Bank in 2003.

Candace Johnson testified that she recently worked at Crockett Hospital as the Chief Nursing Officer. Johnson stated that she was one of three people authorized to sign checks on behalf of the hospital. Other than Johnson, Jack Buck and John Copeland were the only individuals authorized to sign checks. Each check had to be signed by two different people. Johnson identified her signature on five checks: Nos. 179, 180, 181, 178, and 158. She did not recall signing a check made payable to Kimberly C. Hodge. She said that Hodge was "well thought of. You know, I – I believe the corporation was grooming her to be a CFO at one of our facilities. We just fully trusted her. They would send her out to help other facilities, where their business office directors were struggling. We thought a lot of Kim [Hodge]." Johnson stated that she never signed a blank check. She said that usually someone from the business department would bring the checks to administration for them to sign. Johnson acknowledged that although it was hospital policy to have two signatures on checks, one of the five checks she was shown only contained her signature, rather than the two required signatures. She said that it was the responsibility of the person requesting that the check be signed to obtain the two signatures. Johnson stated that she did not know who presented check Nos. 179, 180, 181, 178, and 158 to her. She signed checks a couple of times a month. Either Hodge or Amanda, who worked in payroll, would bring the checks to her to be signed, and sometimes they would bring her more than one check to sign at a time. Of the five checks in issue, three checks contained the same date, May 14, 2003. Johnson stated that she would have noticed if she were presented with three checks made payable to Hodge on the same day.

Bonnie Lipscomb Sanders testified that she worked as a teller at SunTrust Bank between June of 2000 and May of 2003. She stated that she assisted Hodge with her transactions over a period of several years and identified Hodge in the courtroom. She remembered cashing checks for Hodge. When presented with check No. 179 for $5,632 dated May 14, 2003 from Crockett Hospital made payable to Kimberly Hodge, Sanders stated that her identification number appeared on the check, as well as the date, time, and whether the check was written from a SunTrust bank account. Check No. 179 was written from one of Crockett Hospital's accounts at SunTrust Bank. Sanders said that the bank policy was "[i]f you know your customer, and if the customer has an account, and the check is good, you can cash it." She said that the codes on Check No. 179 indicated that it was cashed. Sanders also said that Check No. 175, dated April 25, 2003, for $3,800 from Crockett Hospital was made payable to Kimberly Hodge and was also cashed. Sanders stated that she knew Hodge personally and would not have cashed that check to anyone other than Kimberly Hodge. Sanders said that Check Nos. 179 and 175 appeared proper on their face.

Jack Sanford Buck, the Chief Executive Officer of Crockett Hospital, testified that Hodge worked for him at the hospital as the controller and business officer manager, and he identified her in the courtroom. Buck stated that everyone had a "very favorable" opinion of Hodge before the allegations of embezzlement surfaced and that "a great deal of trust" was placed in her. He remembered Hodge asking him to sign checks but did not recall ever signing a blank check. When Buck was shown check No. 159 signed by him and Candace Johnson and made payable to Hodge, he stated that he would not have signed the check if it were made payable to Hodge. Buck stated that the hospital keeps a carbon copy of all checks before they are sent out. He was shown carbon copies of several checks that were originally made payable to insurance companies and then was shown copies of the cancelled checks bearing the same number where the payee had been altered to

"Kimberly C. Hodge." Buck said that he would have signed checks made payable to insurance companies but would not have signed checks made payable to Hodge. Buck said that the same would be true for every single check that was an exhibit. He was not aware of the hospital doing any research regarding whether Blue Cross Blue Shield was owed any refunds at the time that he signed the aforementioned checks. Buck stated that it was not unusual for checks from the special bank account to be made payable to Blue Cross Blue Shield or Willis Caroon, another insurance company.

Buck first became aware that some money was missing from Crockett Hospital on June 1, 2003. When the hospital began investigating the matter, it discovered that the payee for hospital checks had been altered to Kimberly Hodge, and she became the primary suspect for the missing funds. The hospital contacted the TBI regarding these missing funds prior to meeting with Hodge about the allegations. On June 4, 2003, Buck called Hodge and asked that she come to see him. In the presence of John Copeland, the Chief Financial Officer (CFO), and Bob Augustine, the hospital's Human Resources Director, Buck showed Hodge the checks that had been altered and asked for an explanation. Hodge was not able to offer an explanation and said only, "[P]lease, don't do this to me today." At that point, Buck said that he terminated Hodge and told her that the TBI wanted to talk to her. Buck gave Hodge Agent Cox's card and asked her to meet him at the district attorney's office.

Buck testified that Lifepoint Hospitals, Inc. was the parent corporation to Crockett Hospital. John Copeland was the Ethics and Compliance Officer at Crockett Hospital at the time that Hodge was terminated. Buck acknowledged that if a complaint about accounting irregularities was placed on the ethics and compliance hotline to Lifepoint in 2003, then John Copeland would have been contacted to determine the source of the problem. Because Copeland had an accounting background, he had the knowledge to look into the matter without talking to anyone else.

Buck said that it would not be uncommon for the hospital to pay an insurance company. This would happen in a situation where the insurance company denied a patient's claim after forwarding the funds to the hospital, and then asked to be reimbursed. When an insurance company requested a reimbursement, this request went to the accounting department. He stated that the only reason that the hospital would be sending an insurance company a check was to refund money. There was no pattern regarding the frequency that insurance companies would request refunds, although requests for refunds would come in all the time.

Buck said that Hodge was included in the hospital's bonus plan, and she received her bonus once a year. Buck said that Hodge would "never" receive her bonus more than once a year. He also stated that he did not sign Hodge's bonus checks and that her bonus checks came from a centralized computer system. He said he was not aware of who signed these bonus checks.

Buck acknowledged that Crockett Hospital was under an order not to shred any documents. Although no financial documents were shredded, some medical documents were shredded. He did not know the individuals responsible for shredding these documents.

John Copeland testified that he had been employed at Crockett Hospital for nearly fifteen years as the Chief Financial Officer. He stated that he had a bachelor of science degree in accounting

and completed three or four master's level courses as well. He acknowledged that he was not a certified public accountant. After testifying about his extensive banking background, Copeland was accepted by the trial court as an expert in accounting and banking without objection. Copeland helped compile the documents from the hospital regarding the checks and deposits associated with the embezzlement.

Copeland recalled that on the day that Hodge was terminated Buck showed her two examples of checks that had been altered and asked her if she could provide an explanation. Hodge was unable to explain the disparity in the checks.

Copeland stated that Hodge was participating in an annual bonus program in which she was eligible to receive a bonus of up to ten percent of her salary. Hodge's bonus checks were generated from Crockett Hospital's payroll system, as opposed to the checks associated with the embezzlement charge that were from the special bank account. He also stated that Hodge's regular payroll checks, if they were not direct-deposited, were generated from the payroll system. He identified four of Hodge's bonus checks from the years 2000 to 2003, in the amounts of $2,770.91, $3,538.61, $3,684.07, and $2,668.92. In addition, he identified Hodge's W-2 statements from the years 1997 to 2003, which showed that her income, including her annual bonus, ranged from $22,701.39 to $58,107.37.

Copeland then detailed the manner in which more than forty checks were altered. Under this scheme, a check from the special bank account would be written for a specific amount listing an insurance company as payee. The check was then presented to one of the three individuals authorized to sign checks at the hospital. After the check was signed, the payee on the check was altered to read "Kimberly C. Hodge." Then the check would either be contemporaneously (1) deposited into Hodge's personal bank account at Bank of America or SunTrust Bank, or (2) cashed, or (3) deposited and cashed in part. Copeland identified Hodge's signature as an endorsement on one of the checks that had been altered.

Copeland stated that the insurance companies were never owed money that corresponded to the checks that were altered and never received any complaints from these insurance companies regarding funds owed. Refunds to insurance companies were normally through "reductions in remittance advices" rather than through checks.

Copeland also discussed a second method of embezzling money from the hospital. He discovered that on several occasions there was missing cash from the hospital's deposits to the bank. Under this method, the money was embezzled by filling out a different deposit slip "after it left the hospital and before it was deposited in the bank." The new deposit slip totaled the checks for deposit but did not include all or part of the cash for that deposit. He was not aware that Hodge was taking deposits to the bank until after they discovered the missing funds. Copeland went over records and showed that for nearly each deposit that was missing or short of cash, there was a contemporaneous deposit of an identical or similar amount of cash into Hodge's personal account. This occurred approximately twenty-four times.

Copeland stated the total amount of missing money from checks that were altered was $150,655.29 and the total amount of missing money from the hospital's deposits was $23,842.15. Therefore, the total money missing from Crockett Hospital was $174,497.44.

Hodge was the "director of finance, which included all of the accounting and the business office functions in the hospital." Prior to discovering the missing funds, Copeland said that there was no reason to question Hodge or mistrust her. Before the hospital's policies changed regarding the finances, Hodge received the bank account statements that contained most of the missing original checks.

Copeland confirmed that Lifepoint, the parent corporation of Crockett Hospital, had an anonymous ethics and compliance hotline in April or May of 2003 and that he was the Ethics and Compliance Officer at Crockett Hospital at the time.

Copeland said that he first discovered the missing funds on May 28, 2003 when his "staff accountant came to [him] and . . . said that there was a transaction that she didn't quite understand [in the clearing account for the special bank account] and thought that it didn't seem just exactly right." As he tried to find the records regarding the transactions that were a problem, someone from Bank of America "called and said that they had a couple of checks that they had questions about." The bank employee gave him "the check numbers and the amounts and . . . she said that they were [made payable] to Kimberly Hodge." Copeland said that he talked to the district attorney on June 3, 2003 and to Agent Cox with the TBI the following day about the missing funds.

Copeland testified that "Blue Cross/Blue Shield does not want checks back for refunds. What Blue Cross/Blue Shield wants you to do for refunds – patient refunds – is to call them and let them reduce their remittance advice to us." In other words, Copeland stated that there should never be a check written out of the special bank account register to Blue Cross Blue Shield or Willis Caroon. The money in the special bank account came from the corporate account, and these funds are tied to the general ledger. Before the hospital had notice of the missing funds, the hospital did not require the special account to be reconciled if it had a zero balance on the general ledger.

Copeland testified that even though it was very unusual for a check made payable to Blue Cross Blue Shield or Willis Caroon to be written from the special bank account, Buck would sign them:

> [These checks] were usually brought to Mr. Buck. And they were brought to Mr. Buck by [Hodge]. He trusted Kim and what Kim was doing. She was in a position of trust. . . .So, . . . he would sign those [checks] based on [that trust], even though he might not understand what they were.

Copeland said that Hodge would "step around [him]" by not presenting these checks to him. Hodge presented one check for him to sign from the special bank account made payable to Blue Cross Blue Shield, and he questioned her about it because it was unusual. He ultimately signed the check because "[he] trusted her." He added that none of the other checks that had been altered were

presented to him. He later acknowledged signing three checks in 1998 that were made payable to Kim Hodge.

Copeland stated that the hospital was not aware that they had unauthorized checks coming out of the special bank account:

> The [special bank] account, itself, we just [had] a lapse – a – lax in the controls, because Hodge had control of the checking account and of the reconcilements, themselves. And she would have been the one who had that total control over both sides, which is – is a mistake on our part.

Copeland said that the corporate office tested a few of the checks that had been altered to see if something was wrong with the check stock. In 2003, the corporate office was able to remove a zero and a "TN" for Tennessee and a zip code. He did not know who was told regarding the results of these tests. Copeland said that the hospital shredded medical records that were more than ten years old, which was supervised by the plant operations manager and the manager over maintenance. The medical records that were shredded were housed in a different building than the hospital's financial records. Copeland said that Candace Johnson and Hodge participated in different bonus programs. While Johnson's bonus check was generated by Lifepoint, Hodge's was generated by the hospital. Hodge's payroll and bonus checks were signed by Copeland and Buck.

Copeland stated that although there was no direct evidence that the cash taken from the hospital's deposits was the same cash contemporaneously deposited into the Hodges' joint bank account, he stated that he was aware that Hodge had confessed to this embezzlement scheme. Copeland stated that the amount of missing money from the hospital had increased from approximately $153,000 to $178,000 to $264,000. Every time he looked at the records, he found additional missing funds but had stopped actively looking for missing money.

Mary Frances Putman testified that she had been the cashier at Crockett Hospital for the previous seventeen years. As part of her job, she would count the checks, count the cash, and place them in a zippered bag. After the money had been counted twice, usually a security guard would take it to the bank. However, occasionally, Hodge would tell Putnam that she was going to take the deposit to the bank, which she did not think was unusual. When Putnam noticed a discrepancy between the amount that she calculated and the amount that was actually deposited in the bank, she would notify Hodge, who would take care of it. Putnam said that she never contacted the bank about any discrepancies because Hodge would handle those things. She never suspected that Hodge was taking cash or changing deposit slips. She remembered Hodge asking her for blank deposit slips because Hodge told her they were either going to change the type of account or change banks. Putnam stated that she would check the deposit slip after the money was deposited at the bank, and she was the only person that checked the deposits. Hodge was responsible for reconciling the deposits for that account.

Kristie Taylor testified that she took over the accounting department following Hodge's termination. During Hodge's employment at the hospital, Taylor worked as a staff accountant, and Hodge was her supervisor. Taylor stated that the hospital had three different bank accounts: a Bank

of America account for deposits, a SunTrust account for special bank account checks, and a SunTrust account for payroll. Taylor stated she managed the payroll account while Hodge was her supervisor. Hodge reconciled the depository account, and the special bank account was not reconciled if the balance was zero.

In 2003, Taylor noticed something suspicious regarding the special bank account. She said, "There was a manual journal entry done to the [special bank account] – general ledger account, where – the only entries that should hit there are system generated." The manual entry was for three manual checks in April of 2003 that had been cleared but had not been keyed into the system. Taylor notified Copeland regarding these three checks at the end of May of 2003. Taylor helped Copeland investigate the matter and discovered that Hodge was involved in several of these checks. This was when the hospital discovered that the checks were coming back with Kimberly C. Hodge as the payee.

Mary Casteel, Hodge's mother, testified that she worked for Crockett Hospital in various nursing positions. Casteel stated that she and Hodge and her family had been on a trip to Disney World the week prior to Hodge's termination. When Casteel was told that her daughter had been terminated, she and her husband, Eddie Casteel, and her son-in-law, Roy Hodge, tried to locate Hodge. At first, Buck and Copeland would not tell them where Hodge had gone. Finally, they were told that Hodge went to the district attorney's office. Mary and Eddie Casteel had to wait thirty to forty-five minutes before they were able to talk to their daughter. Hodge's husband was able to see her first. Mary and Eddie Casteel talked to Agent Jack after they had waited for fifteen minutes at the district attorney's office. Approximately twenty minutes later, they saw Hodge. Casteel said that Hodge was "hysterical" and "sobbing" when they finally saw her.

Debbie Dial testified that she was the customer service manager and assistant vice president for the North Locust Branch of Bank of America. In June of 2000, she contacted John Copeland regarding fraudulent activity between Hodge's personal bank account and Crockett Hospital's account. Dial stated that they believed that Hodge's salary was direct deposited, and the activity between the two accounts was a red flag for fraudulent activity because cash deposits for the hospital were going into Hodge's personal bank account. Once the bank became suspicious, they found several fraudulent transactions. Dial contacted Copeland about suspicious checks being deposited into Hodge's personal bank account. The bank also discovered that she was depositing cash from the hospital's deposits into her own bank account.

Dial was shown several deposit slips where the account number, which ordinarily showed where the money was deposited, was not visible. Dial said that the account number was not visible because the account number had "been washed." Dial explained how numbers could be washed from documents: "[I]nstead of using . . . White-Out, . . .[y]ou can just actually take some kind of bleach or something and just wash it out."

Roy Hodge testified that he had been married to the Defendant-Appellant for seventeen years and they had two children. Aside from working at a car dealership, he also worked at a scuba diving business. He noticed that his wife was very depressed a month or two before she lost her job. He discovered that Hodge lost her job at Crockett Hospital a couple of hours after she was terminated when Mary Casteel came to his workplace. When he arrived at the district attorney's office, his in-

laws told him that his wife had been accused of taking some money. Roy Hodge said, "I was just floored. And I couldn't – You know, I couldn't fathom that. You know, why would she do something like that? She wouldn't do that." He waited thirty to forty-five minutes at the district attorney's office before he was able to see his wife. Agent Jack, whom he had known for several years, brought him to Hodge. His wife "was extremely upset. Shaking very, very bad. She couldn't even – I couldn't understand her. She was . . . shivering so much . . . just crying, uncontrollably. I've never seen her that way." Hodge told him that she had given a statement, and the agents were in the other room typing it. In the meantime, his in-laws had entered the room, and he asked them if his wife needed an attorney. Eddie Casteel went to talk to Agent Jack. Roy Hodge saw his wife initial the Miranda rights waiver, and as she was signing her name to the statement, he told her, "we need to read this." Hodge told him that she just wanted to get out of there, and she signed the statement.

Roy Hodge stated that he and his wife had a joint checking account. She balanced this checking account most of the time, and he did not usually look at the bank statements. However, he said he would have noticed large amounts of money coming into his account. He explained, "[W]e don't have anything. But if we owned all of this stuff, or something, I would – you know, I – I would probably be looking for things." He stated that he made between $40,000 and $45,000 a year. He acknowledged that he and his wife deposited approximately $5,000 a month from their salaries into their checking account. He also received commission checks from his work, and his wife "got a bonus on each account [at the hospital], once a month, I believe." He thought that she had been getting monthly bonuses since she received her last promotion in 1998 or 1999.

He explained that one of the transactions in question was regarding money that he received from his father-in-law for sports tickets. He said that he did not believe that he and his wife spent a lot of cash because "we don't have anything." He also claimed that a deposit of $2700 was a reimbursement for accommodations on a dive trip. He was unable to explain several deposits totaling over $10,000 per month, other than to claim that one or two might have been related to the dive business. Three tax returns were admitted into evidence showing that Roy and Kimberly Hodge reported income of $142,761.00 in 2003, $101,155.78 in 2002, and $97,783.72 in 2001.

Roy Hodge also stated that they had refinanced their house after his wife was terminated. They currently owed $87,000 on their house but prior to their refinance they owed $78,000. Also, they had landscaped their yard and put up a fence. He said that he would buy dive gear and then sell it for a profit, although he was not an owner in the dive shop. Roy Hodge said that they usually took two dive trips a year to Florida, North Carolina, Alabama, and Tennessee.

Kimberly Hodge testified that she began working at Crockett Hospital in 1992 as an accounts payable clerk. She was promoted in 1994 to staff accountant, in 1997 to accounting manager, and in 1999, to controller or accounting manager and business office manager. Six months later, she became director of financial services with the same responsibilities. She stated that she did not take cash out of the hospital's deposits that did not belong to her and did not alter the hospital's checks so that they would be payable to her. She described herself "as extremely stressed, working a lot of hours, expected to work a lot of hours." On a scale of 1 to 10 with 1 being in horrible mental health and 10 being excellent mental health, she rated herself in June of 2003 as a 2.

Hodge stated that she called the ethics and compliance hotline at the end of February or the beginning of March of 2003 because she "did not feel like some of the accounting procedures were working properly, or some of the accounts were being done properly." She explained, "There were several banking accounts that I – I did not handle, several insurance accounts that I did not handle. And I was seeing some journal entries being done that I didn't think were proper." She "felt like the hospital records needed to be audited." She asked Copeland if she could look at these accounts at the end of 2002 or January of 2003.

Hodge stated that she was probably not "100% [her]self" during the late May 2003 trip to Disney World with her family. She said that the call to the ethics and compliance hotline bothered her because "[d]eep in [her] mind, [she] knew something wasn't right. And . . . not knowing what it was or – or – or, maybe, if [she] had even done something wrong . . . [she] just didn't know what was going on."

Hodge testified that after she was terminated, she was told to go to the district attorney's office to see Agent Mike Cox. Buck and Copeland told her that if she did not go talk to Agent Cox, she would be arrested. She immediately thought about her children not having a mother. Hodge said that she had never been arrested or convicted of anything before and had never even had a speeding ticket. When she finally found the district attorney's office, she saw Lucille Putnam, a family friend. Then she saw Agent Jack and Agent Cox. She knew that Agent Jack had worked closely with her father in the housing authority, which made her feel more comfortable. At first, Agents Cox and Jack asked her basic information, and then they started talking to her about the embezzlement allegations at the hospital. She stated that she was in shock. She did not remember being read her Miranda rights or reviewing documents related to the embezzlement allegations. She did not remember how long she was in the room with Agents Cox and Jack although she said, "It felt like a year." She remembered Agent Cox having a computer in the room. She did not remember whether he was typing what she said verbatim and stated that the statement that was admitted into evidence was not in her words. She rated herself as a zero on the mental health scale of 1 to 10 at the time that they were taking her statement. She was not given the opportunity to call her parents or to use the restroom. She was not told she could leave, and the door to the interview room was closed. She was never told that her parents and her husband were present at the district attorney's office. She remembered signing the statement in the presence of her husband but said that the statement was not true. She signed it because she was thinking about her children at the time. After signing the statement, she went home and wanted her children to come home. She sought medical help and took Lexopro and Wellbutrin for her depression related to this case. However, she said she was no longer seeing a mental health expert and was not taking any medication at the time of the trial.

Hodge said that she received monthly bonuses and that some of the checks that had been admitted into evidence were related to her bonuses. She recalled telling Agents Cox and Jack everything in her statement until the part of the statement that read, "In June of 2000, I embezzled money from the hospital for the first time." She stated that she did not tell the agents that information because "[that was] just not something I would say." She did not tell the agents the other things contained in her statement. She remembered the agents putting a list of checks with Willis Caroon and Blue Cross Blue Shield in front of her. At that point, the State asked her if she could explain how the agents would have known the names of the tellers at SunTrust Bank and Bank of America that

were included in her statement if she did not give the tellers' names to them. Hodge did not offer an explanation. She remembered signing the Miranda waiver and initialing each one of her rights. However, she claimed that she did not read the Miranda waiver. Hodge also stated that she did not admit that she had taken additional funds from the hospital when she and her attorney met with Agent Jack. She claimed that Buck and Copeland lied about the fact that she was only supposed to receive a bonus once a month. She stated that she earned about $50,000 in bonuses each year that were not reflected in her tax returns. She claimed that some of her bonus checks were not included in her W-2 statements, and she used the figures from the W-2 statements in preparing her tax returns. Hodge identified several annual bonus checks generated from Crockett Hospital and explained that this was one way that she received her bonus checks. She then stated that she also received her bonuses through the checks from the special bank account that were entered into evidence. She opined that she was receiving checks from the special bank account because Copeland and Buck may not have wanted Lifepoint Hospitals, Inc. to know that she was receiving these funds.

Although Hodge had previously stated that she received one bonus check per month during her testimony, she then stated that she sometimes received two checks. When asked whether the checks from the special bank account were legitimate checks for her bonus, Hodge said that three of the five checks were her bonus checks. For the remaining two checks, she was shown records proving that the payee was changed from "Blue Cross/Blue Shield" to "Kimberly C. Hodge" and then deposited into her personal bank account. Hodge stated that she did not trust the records from the hospital and the bank because "Mr. Copeland has had all of my banking records. And I don't know what's altered, what's not altered." She acknowledged that she would sometimes take the hospital's deposits to the bank but said she did not know if she "had access to the missing money." She said that she put the thousands of dollars in bonuses that she earned in savings, and she spent some of this money.

Hodge stated that the second statement she made to Agent Jack at her attorney's office was never reduced to writing or recorded, so she was unable to review it. She was willing to wear a wire and talk to someone at the hospital, but the district attorney's office declined her offer.

ANALYSIS

I. Sufficiency of the Evidence. Hodge argues that the evidence was insufficient to support her conviction. First, Hodge asserts that because the majority of the documents admitted at trial were in the custody and control of John Copeland during the time period between Hodge's termination and trial, they are unreliable. Second, Hodge claims that the State's failure to obtain more than five cancelled checks showing her as the payee and the State's admission that changes were made to these cancelled checks at LifePoint Hospitals, Inc. weakens the State's evidence. Third, the fact that the hospital shredded documents in contravention of a court order undermines the sufficiency of the evidence against Hodge. Fourth, Hodge maintains that her call to the ethics and compliance hotline for LifePoint Hospitals, Inc. "placed the corporate office on notice of booking irregularities potentially committed by John Copeland." Fifth, Hodge argues that her statement to the TBI agents was not voluntary. She asserts that she was not told of her Miranda rights and did not sign the Miranda rights waiver until the end of the interview. Furthermore, she maintains that the statement typed by Agent Cox is inaccurate and that she did not review this statement before signing it.

In response, the State contends that the evidence was more than enough to convict her. It relies on the defendant's confession to taking more than $140,000 by altering checks and over $10,000 by taking cash from the hospital's deposits. In addition, the State emphasizes (1) the checks totaling $150,655.29 that were made payable to Hodge without the hospital's permission which were admitted into evidence; and (2) the records showing that Hodge took $23,842.15 in cash from the hospital's deposits, which were corroborated by the hospital's bank statements and records and Hodge's own bank statements. Finally, the State argues that despite Hodge's claim that Copeland was guilty of the bookkeeping irregularities in her anonymous call to the ethics and compliance hotline and that he was biased against her, these were credibility issues to be determined by the jury.

The standard of review for challenges to the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original) (citation omitted); Tenn. R. App. P. 13(e); State v. Winters, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003) (citations omitted). This court does not re-weigh the evidence or substitute its inferences for those drawn by the trier of fact. Winters, 137 S.W.3d at 655 (citations omitted). All factual issues raised by the evidence, questions concerning the credibility of the witnesses, and the weight and value of the evidence have been resolved by the trier of fact. Id. (citation omitted). This court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978), superseded by statute on other grounds as stated in State v. Barone, 852 S.W.2d 216, 218 (Tenn. 1993).

A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in the State's favor. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997) (citation omitted). "Because a verdict of guilt removes the presumption of innocence and imposes a presumption of guilt, the burden shifts to the defendant upon conviction to show why the evidence is insufficient to support the verdict." State v. Thacker, 164 S.W.3d 208, 221 (Tenn. 2005) (citations omitted). These rules apply regardless of whether the finding of guilt is predicated upon direct evidence, circumstantial evidence, or a combination of both. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999) (citation omitted).

Pursuant to Tennessee Code Annotated section 39-14-103, "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Theft of property valued over $60,000 is a Class B felony. See T.C.A. § 39-14-105.

We conclude that the evidence was more than sufficient to convict Hodge of theft of property valued over $60,000. The State not only proved her guilt through the use of her confession but also proved through the use of records and bank statements that Hodge embezzled over $174,000 through two different schemes: (1) she altered checks originally made payable to insurance companies by making herself the payee, and (2) she stole cash from the hospital's bank deposits. The State proved Hodge's theft by comparing the carbon copies of checks as they first appeared with the altered checks

listing Hodge as the payee at the time they were presented at the bank. The State then systematically showed that Hodge endorsed these checks and then contemporaneously cashed or deposited them into her joint bank account shared by her husband. The State also showed contemporaneous deposits of cash that corresponded to the cash missing from the hospital's bank deposits. We will not disturb the jury's determination regarding the credibility of the witnesses and the weight given to the evidence, and Hodge has failed to prove that the evidence was insufficient to convict her. Accordingly, she is not entitled to relief on this issue.

II. Denial of Motion to Suppress. Hodge argues that the trial court should have suppressed her statement on the ground that it was involuntary. She further contends that her meeting with the TBI agents constituted a custodial interrogation, which required the agents to advise her of her Miranda rights. In support of these arguments, Hodge makes several assertions. Upon her termination from the hospital, Hodge asserts that she was told if she met the TBI agents at the district attorney's office she would not be arrested. She argues that the presence of Agent Jack, an individual who had worked closely with her father, made her more "comfortable." She stated that she was in the interview room with Agents Jack and Cox over one and one-half hours. Despite the fact that her mother, father, and husband arrived at the office during the interview, she claims that she was not told of their presence and was not allowed to talk to them. She maintains that she was not advised of her Miranda rights. She also claims that Agent Jack indicated that the case could be resolved if she cooperated and agreed to pay restitution. Finally, Hodge asserts that she signed the Miranda rights waiver and her statement without reviewing these documents.

In response, the State contends that the trial court properly denied the motion to suppress. The State argues that because Hodge voluntarily took part in the interview with the TBI agents, the Miranda warning was not necessary. Secondly, the State argues that Hodge executed a valid Miranda waiver prior to answering any questions regarding the missing funds, thereby waiving those rights.

The courts of this state have concluded that "a trial court's determination at a suppression hearing is presumptively correct on appeal." State v. Saylor, 117 S.W.3d 239, 244 (Tenn. 2003) (citing State v. Harbison, 704 S.W.2d 314, 318 (Tenn. 1986)). However, if the record on appeal preponderates against the trial court's determination, then the presumption of correctness may be overcome. Harbison, 704 S.W.2d at 318 (citing Mitchell v. State, 458 S.W.2d 630, 632 (Tenn. Crim. App. 1970)). The Tennessee Supreme Court explained this standard in Odom:

> Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld.

State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996).

The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Similarly, the Tennessee Constitution states "that in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. Under the Fifth Amendment, a confession is involuntary when it is the result of coercive action on the part of the State. Colorado v. Connelly, 479 U.S. 157, 163-64, 107 S. Ct. 515, 520 (1986).

"The test of voluntariness for confessions under article I, § 9 of the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." State v. Smith, 933 S.W.2d 450, 455 (Tenn. 1996) (citing State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994)). In order for a confession to be considered voluntary in Tennessee, it must not be the result of "'any sort of threats or violence, . . . any direct or implied promises, however slight, nor by the exertion of any improper influence.'" State v. Smith, 42 S.W.3d 101, 109 (Tenn. Crim. App. 2000) (quoting Bram v. United States, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187 (1897)). In determining the voluntariness of a statement, the trial court must look at the totality of the circumstances and decide if "the behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." State v. Kelly, 603 S.W.2d 726, 728 (Tenn. 1980) (quoting Rogers v. Richmond, 365 U.S. 534, 544, 81 S. Ct. 735, 741 (1961)).

"Inherent in the admissibility of the written statement is that the statement was voluntarily given by a defendant knowledgeable of his constitutional rights and accompanied by a valid and knowing waiver of those rights." State v. Berry, 141 S.W.3d 549, 577 (Tenn. 2004) (citing Miranda v. Arizona, 384 U.S. 436, 467, 86 S. Ct. 1602, 1624 (1966); State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992), cert. dismissed, 510 U.S. 124, 114 S. Ct. 651 (1993). "A defendant's subjective perception alone is not sufficient to justify a conclusion of involuntariness in the constitutional sense." State v. Smith, 933 S.W.2d at 455.

Miranda warnings are not required in non-custodial interrogations. Miranda, 384 U.S. at 478, 86 S. Ct. at 1630. In order to determine whether a person is in custody pursuant to Miranda, the proper inquiry is "whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1529 (1994) (internal citations and quotations omitted). Regarding statements obtained during custodial interrogations, the United States Supreme Court held:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

Miranda, 384 U.S. at 444, 86 S. Ct. 1612.

In the Northern case, the Tennessee Supreme Court emphasized the strength of a Miranda warning and waiver:

> The warnings and waiver mandated by Miranda "are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant" during custodial interrogation, whether inculpatory or exculpatory. Id. at 444, 476-77, 86 S. Ct. 1602. When Miranda warnings are given and a waiver obtained, the prosecution has "a virtual ticket of admissibility" for any resulting custodial statement of the defendant. Seibert, 542 U.S. at 608-09, 124 S. Ct. 2601. Indeed, "maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina" and usually is a losing argument in court. Id. at 609, 124 S. Ct. 2601; see also Berkemer v. McCarty, 468 U.S. 420, 433 n. 20, 104 S. Ct. 3138 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.").

Northern, 262 S.W.3d at 749.

We note that the testimony of the witnesses at the suppression hearing was substantially the same as the testimony given during trial. After hearing the evidence at the suppression hearing, the trial court determined:

> [I]n light of her testimony today, she's been so incredible on some issues, the court has trouble believing her testimony on any issues concerning time and other things. . . .
>
> . . . .
>
> . . . The credible testimony in this case establishes clearly that the statement, while made in a situation and at a time [Hodge] would have been uncomfortable, is not, under the law, inadmissible as either involuntary or in violation of Miranda rights.
>
> . . . .
>
> But today, the State need merely convince the Judge that by a preponderance of the evidence she was timely advised of her rights, even if those were required, and I frankly doubt that they were. And it is always, I guess, a safer law enforcement practice to give them anyway. And that while maybe [no one] comes into court and pleads guilty or [no one] goes to law enforcement officers and confesses criminal conduct, that this is not the kind of involuntariness contemplated by our constitution, as interpreted by appellate courts.
>
> Therefore, the motion to suppress will be denied, and the State may draft an order.

The record demonstrates that Hodge's statement was voluntary and that she was advised of her Miranda rights before giving her statement. The proof from the suppression hearing showed that Hodge was well-educated and capable of reading, writing, and comprehending the significance of the

Miranda rights waiver and her statement. The testimony showed that she voluntarily came to the district attorney's office, that she was offered a break to get something to drink or to use the restroom, and that she never asked for an attorney. The record shows that the trial court credited the TBI agents' testimony that she was advised of her Miranda rights prior to talking with her about the theft charge and that she voluntarily waived her rights prior to giving her statement. Furthermore, the record shows that the trial court found Hodge's testimony at the suppression hearing to be incredible. We conclude the preponderance of the evidence supports the trial court's denial of Hodge's motion to suppress.

III. Denial of Motion to Continue. Hodge contends that the trial court's rejection of the guilty plea agreement four days prior to trial prejudiced her and denied her a fair trial because her attorney was unable to meet with the State's witnesses, consult with an accounting firm to rebut the State's claim that she was involved in improper accounting procedures, examine the hundreds of relevant documents, or show how another hospital employee was responsible for the theft prior to trial. In addition, because Hodge's attorney was not told about her involvement in another theft case until one day before trial, her attorney could not adequately advise her regarding an acceptable plea bargain agreement. She contends that it would be reasonable to conclude that the outcome of the trial would have been different had her attorney been granted additional time to prepare for trial.

In response, the State contends that the trial court did not abuse its discretion in denying the motion for a continuance since the case had been pending for two years and had been reset four different times. Further, Hodge's attorney's claim that he was unable to talk to the State's witnesses or consult with an expert is unpersuasive given the length of time for the case and the numerous trial settings. Finally, the State argues that Hodge has failed to show that she was prejudiced by the trial court's refusal to grant another continuance in this case. The State contends that, in addition to challenging the credibility of several witnesses, Hodge's attorney was able to: (1) establish that Hodge was allowed to obtain only one signature on checks, even though hospital policy required two signatures, (2) obtain a concession that Candace Johnson could not remember the individual who brought her checks, (3) show that some of checks could have been bonus checks to Hodge, and (4) file several pre-trial motions including a motion to suppress her statement.

The grant or denial of a continuance rests within the sound discretion of the trial court. State v. Rimmer, 250 S.W.3d 12, 40 (Tenn. 2008) (citing State v. Odom, 137 S.W.3d 572, 589 (Tenn. 2004); State v. Russell, 10 S.W.3d 270, 275 (Tenn. Crim. App. 1999)), cert. denied, 77 U.S.L.W. 3200 (U.S. Oct. 6, 2008) (No. 07-11167). The decision to deny a continuance will be reversed by this court "only if it appears that the trial court abused its discretion to the prejudice of the defendant. Odom, 137 S.W.3d at 589 (citing State v. Hines, 919 S.W.2d 573, 579 (Tenn. 1995)). "An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted." Hines, 919 S.W.2d at 579 (citing State v. Wooden, 658 S.W.2d 553, 558 (Tenn. Crim. App. 1983)). When a defendant claims that the denial of a continuance constitutes a denial of due process or the right to counsel, then he or she must establish actual prejudice. Rimmer, 250 S.W.3d at 40 (citing Odom, 137 S.W.3d at 589)).

In denying the motion to continue, the trial court considered the arguments of both parties, the two years that the case had been pending, and the four continuances that had already been granted. Upon reviewing the record, we conclude that the trial court's denial of the motion for a continuance was not an abuse of discretion. The record contains no indication that Hodge was denied due process or her right to a fair trial or that the outcome of trial would have been different if the trial court had granted the continuance. Therefore, Hodge is not entitled to relief on this issue.

IV. Refusal to Voir Dire Jurors Regarding the Voluntariness of Statement. Hodge argues that the trial court abused its discretion by "refusing to allow trial counsel to question prospective jurors concerning their willingness to consider factors related to the voluntariness of her statement[.]" She claims the trial court's denial of this line of questioning prevented her from selecting a fair and impartial jury. In response, the State argues that the trial court had previously determined that Hodge's statement was admissible at the suppression hearing; therefore, this issue was not proper for voir dire. Further, the State contends that the trial court properly instructed the jury on their duty to determine the weight and credibility given to Hodge's statement.

The objective of voir dire is to make certain that jurors "are competent, unbiased, and impartial, and the decision of how to conduct voir dire of prospective jurors rests within the sound discretion of the trial court." State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993) (citing State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992); State v. Simon, 635 S.W.2d 498, 508 (Tenn. 1982); Mu'Min v. Virginia, 500 U.S. 415, 111 S. Ct. 1899 (1991)). "The control of voir dire proceedings rests within the sound discretion of the trial court, and this court will not interfere with the exercise of this discretion unless clear abuse appears on the face of the record." State v. Reid, 213 S.W.3d 792, 835 (Tenn. 2006) (citing State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993), cert. denied, 510 U.S. 1215, 114 S. Ct. 1339 (1994)).

It is unclear on this record whether defense counsel actually posed a question regarding the voluntariness of Hodge's confession in voir dire or merely intimated that the jury could ignore the law when the State lodged an objection. In any event, at the jury-out hearing on the State's objection, the State argued that the defendant should be precluded from asking questions regarding her confession because the issue was "hotly contested" and the trial court had already determined its admissibility. Defense counsel responded that "the jury could still consider the voluntariness of the statement. They could consider the facts as it relates [sic] to whether it was voluntary or not[.]" Defense counsel specifically requested permission from the trial court to ask the jury whether they could consider the following factors in regard to Hodge's statement:

> Hope, fear of law enforcement overbear [sic] the will of the defendant, promises, coercion, the defendant's age, the defendant's intelligence, the defendant's education, the defendant's criminal experience or lack thereof, mental health, physical health of the defendant;
>
> Whether any deceit or trickery was used by law enforcement, whether there was any mental or physical coercion, intoxication, threats to others, the type of statements that were made to the defendant, sleep deprivation;

> Whether the officers were armed or not, and whether there was any misrepresentation made by the officer to the defendant prior to taking or giving the statement.

Defense counsel advised the court that he wanted to pose each of the above factors as individual questions to the jury. After engaging in a series of exchanges with defense counsel analyzing each of the above factors, the trial court determined they were not proper questions for voir dire.

We begin our analysis of this issue by recognizing that Tennessee has long required the voluntariness of confessions to be conclusively decided by the trial judge. See State v. Pursley, 550 S.W.2d 949 (Tenn. 1977).

> When confessions are offered as evidence, their competency becomes a preliminary question, to be determined by the court. This imposes upon the presiding judge the duty of deciding the fact whether the party making the confession was influenced by hope or fear. This rule is so well established, that if the judge allowed the jury to determine the preliminary fact, it is error, for which the judgment will be reversed.

Id. at 950 (quoting Self v. State, 65 Tenn. 244 (1873)). After the trial court determines that the confession is admissible, the jury determines the weight to be given to the confession, whether the defendant made the confession and whether the statements contained in it are true. To aid them in resolving these questions the jury may hear evidence of the circumstances under which the confession was procured. Sims v. Georgia, 385 U.S. 538, 87 S. Ct. 639 (1967); Wynn v. State, 181 Tenn. 325, 181 S.W.2d 332, 333 (1944); see also Pursley, 550 S.W.2d at 950.

As an initial matter, Hodge does not present any authority in support of this issue in her brief. Based on the above well established law, her argument to submit the voluntariness factors to the jury must necessarily fail. Hodge's argument, in the alternative, that the voluntariness factors "might affect the weight a juror assigns the statement" is equally unpersuasive. Moreover, we have not found any prior Tennessee decision specifically addressing questions regarding the voluntariness of a defendant's confession in voir dire. The Sixth Circuit, however, faced a similar issue in United States v. Price, 888 F.2d 1206 (6th Cir. 1989). In Price, the defendant challenged as reversible error the trial court's refusal to ask three of his proffered voir dire questions, all of which were related to the defendant's disputed admission to the charged offense. Price argued the trial court's refusal to allow questions regarding the admission was "constitutional error because of 'the serious prejudicial value inherent in such confession testimony.'" Price, 888 F.2d at 1210. The Sixth Circuit flatly rejected this argument and stated:

> Neither due process, nor the right to an impartial jury, nor sound reasoning and logic require that trial judges specifically present the venire with the most incriminating, disputed pieces of the government's case simply because they are so incriminating.

Id. (emphasis in original). The court further reasoned that requiring the trial court to do so would (1) "result in the disqualification of most (honest) prospective jurors;" (2) "require prospective jurors to determine, before being properly presented with the evidence and observing the witnesses' demeanor, whether or not an important disputed event took place or statement was made;" (3) "allow both sides to introduce, comment upon and possibly mischaracterize the evidence which is to be introduced in the course of the trial;" and (4) "be an intrusion on the trial judge's traditional broad discretion in conducting voir dire." Id. at 1211. Unlike valid general propositions of law such as the defendant is presumed innocent or has no burden of proof, the proposed questions were rejected because they were aimed at exposing the prospective jurors to a disputed piece of evidence and measuring their reaction to it. Id. n.6.

Over fifty pages of the transcript in this case were dedicated to the defense voir dire. The trial court instructed the jury when considering the weight to be given to Hodge's admission, to likewise consider the facts and circumstances under which the admission was made.[980] Based on the record, the voir dire allowed Hodge to select competent, unbiased, and impartial jurors as well as knowledgeably exercise peremptory challenges. Accordingly, the trial court did not abuse its discretion and Hodge is not entitled to relief.

V. Lay Witness' Identification of Handwriting Sample. Hodge argues that she was prejudiced by John Copeland's identification of her signature on the endorsement of one of the checks. First, she contends that the State did not satisfy Rule 701(a)(2) of the Tennessee Rules of Evidence, which requires that his opinion be "helpful to a clear understanding of the witness's testimony." Tenn. R. Evid. 701(a)(2). Second, Hodge argues that the State did not lay the proper foundation for Copeland's identification of her handwriting as required by Rule 901(b)(2), which states that non-expert identification of handwriting must be "based upon familiarity not acquired for purposes of the litigation." Tenn. R. Evid. 901(b)(2). She claims that Copeland should not have been allowed to provide his opinion regarding the handwriting without first providing testimony regarding his familiarity with her signature. In response, the State argues that because Hodge did not raise a contemporaneous objection at trial or include this issue in her motions for a new trial, this issue is waived under Rule 36(a) of the Tennessee Rules of Appellate Procedure.

We note that one of the issues in Hodge's amended motion for a new trial was that "the court erred by allowing a non-expert written [sic] to testify as an expert witness." Although this statement is unclear, we acknowledge that defense counsel most likely meant "witness" rather than "written," and we decline to waive this issue on that basis. However, waiver is appropriate based on Hodge's failure to make a contemporaneous objection at the time of this testimony. Rule 36(a) states that appellate relief is typically not available when a party has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of any error." Tenn. R. App. P. 36(a); see also State v. Sims, 45 S.W.3d 1, 16 (Tenn. 2001). The record shows that Hodge failed to object at trial when Copeland identified her signature on the endorsement of one of the altered checks, thereby preventing the State from curing any deficiencies regarding the foundation. Accordingly, this issue is waived.

VI. Duplicates of Bank and Hospital Records. Hodge contends that she suffered an undue hardship in preparing her defense because the State was allowed to enter duplicate documents into evidence to prove her alleged involvement in the theft. Specifically, she argues that she was prejudiced by the State's contention that all but five original checks that were purportedly altered by Hodge were destroyed. Additionally, she contends that she was unable to present her defense that the funds were taken by another employee of the hospital because the original documents were destroyed. She asserts that the proof showed that the hospital shredded documents in contravention of an order of the trial court, and although the hospital claimed that only medical records were shredded, she claims that documents related to this case were shredded as well to conceal the identity of the thief.

In response, the State contends that the trial court did not abuse its discretion in admitting duplicates of the altered checks and deposit slips. The State notes that Hodge does not question the accuracy of her bank statements or the authenticity of the checks and deposits as identified by the proper custodians; instead, she claims that an unidentified person forged her name on the original checks.

Here, Hodge has failed to specify which original records that she needed in order to prepare her defense or how she was prejudiced by the State's failure to produce them. Therefore, we conclude that she is not entitled to relief on this issue.

VII. Denial of Mistrial. Hodge argues that she was unduly prejudiced when her motion for a mistrial was denied because she was not notified that the five original cancelled checks had been tested until after the checks were admitted into evidence. She asserts that the State's failure to follow Rule 16 of the Tennessee Rules of Criminal Procedure regarding discovery of test results hindered the development of her defense, made her attorney believe that the State had concrete proof that Hodge had altered the checks, and affected her attorney's ability to advise her about the evidence that would be presented at trial.

In response, the State contends that the trial court properly exercised its discretion in denying the motion for a mistrial. First, the State argues that Hodge has failed to prove the existence of an actual test result from LifePoint that would warrant a mistrial. Second, it argues that Hodge's attorney had access to the district attorney's file, which contained the original cancelled checks that were tested by LifePoint and the copies of the checks as they appeared when Hodge cashed or deposited them, so he should have been aware that they were different. Third, the State argues that the State did not request the testing and did not present expert testimony regarding the method that Hodge used to alter the payee on the checks to herself. Fourth, the changes to the checks caused by testing resulted in non-substantive changes to the print on the cancelled checks because the payee, the endorsement, and the routing information was not altered during testing. Finally, given Hodge's confession to thirty-six transactions of theft, she fails to show that the outcome of her trial would have been different had the alleged tests been disclosed.

Rule 16(a)(1)(G) states the following regarding test results:

> Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph the results or reports of physical or mental examinations, and of scientific tests or experiments if:
>
> (i) the item is within the state's possession, custody, or control;
>
> (ii) the district attorney general knows--or through due diligence could know--that the item exists; and
>
> (iii) the item is material to preparing the defense or the state intends to use the item in its case-in-chief at trial.

Rule 16 also states that in the event that a party fails to comply with this rule, the trial court may "enter such other order as it deems just under the circumstances." Tenn. R. Crim. P. 16(d)(2)(D). Where a party fails to produce discoverable material by the deadline, "the trial judge has the discretion to fashion an appropriate remedy; whether the defendant has been prejudiced by the failure to disclose is always a significant factor." State v. Smith, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995) (citing State v. Baker, 751 S.W.2d 154, 160 (Tenn. Crim. App. 1987)). Furthermore, "the burden rests on the defense to show the degree to which the impediments to discovery hindered trial preparation and defense at trial." State v. Brown, 836 S.W.2d 530, 548 (Tenn. 1992). The State has no obligation to give the appellant evidence which is available to him or which the appellant could obtain through reasonable diligence. State v. Dickerson, 885 S.W.2d 90, 92 (Tenn. Crim. App. 1993).

The grant or denial of a motion for a mistrial rests within the sound discretion of the trial court. State v. Robinson, 146 S.W.3d 469, 494 (Tenn. 2004). A trial court should declare a mistrial "only upon a showing of manifest necessity." Id. (citing State v. Saylor, 117 S.W.3d 239, 250-51 (Tenn. 2003)). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." Id. (citing State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996)). This court will not reverse the trial court's denial of a motion for mistrial "absent a clear showing that the trial court abused its discretion." Id. (citing State v. Reid, 91 S.W.3d 247, 279 (Tenn. 2002)). The seeking party has the burden of establishing the "manifest necessity" of a mistrial. State v. Reid, 164 S.W.3d 286, 342 (Tenn. 2005) (citing State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996)).

As with most sections of the appellant's brief, she has failed to make any reference to the record in support of this issue. "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." See Tenn. Ct. Crim. App. R. 10(b). Failure to comply with this basic rule will ordinarily constitute a waiver of the issue. Id.; State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000). In any event, we have reviewed the record and conclude that the trial court did not abuse its discretion in refusing to declare a mistrial. Here, the State had an "open file" policy which allowed Hodge's attorney access to the cancelled checks at the time they were presented to the bank and following the testing by Lifepoint.

The trial court noted that the State should have advised defense counsel about the testing and stated, "But I see that in no way, whatsoever, does the simple attempt to lift non-essential letters . . . from these three (3) checks prejudice the defendant in any – any way in the preparation of her case or in negotiations for a plea agreement . . ." Hodge has failed to prove a mistrial was a "manifest necessity." She is not entitled to relief on this issue.

VIII. Sentencing. Hodge contends that the sentence imposed by the trial court was excessive. First, Hodge maintains that the trial court failed to follow the sentencing considerations in Tennessee Code Annotated section 40-35-103. Second, she argues that the trial court refused to acknowledge the abundance of proof offered regarding her propensity for rehabilitation, including her lack of a criminal history, her placement in the low risk category for recidivism, and her twenty-seven letters from individuals in the community regarding her character. Third, she contends that her confinement would negatively impact her children socially, educationally, and financially. Fourth, Hodge argues that the trial court improperly considered her lack of remorse during the guilty plea hearing. Fifth, she argues that the trial court erred in justifying the sentence of confinement by taking judicial notice of other individuals convicted of similar offenses when the proof showed that most of these individuals received a sentence of probation rather than confinement.

In response, the State argues that the trial court did not impose an excessive sentence. First, the State claims that an alternative sentence was not proper because of the class of the offense, because the theft exceeded the amount required to grade the offense, and because she abused a position of private trust. Second, the State maintains that Hodge is not entitled to a presumption of alternative sentencing because she was convicted of a class B felony. Third, the State presented evidence at trial showing that Hodge's theft required additional time and money in order to change hospital procedures and that the hospital spent more than 200 hours discovering the extent of her theft. Fourth, the State argues that the trial court was aware that Hodge had been investigated for another claim of embezzlement through a new employer. Fifth, Agent Cox testified to the increase in embezzlement cases assigned to him in middle Tennessee, and the State entered indictments and judgments from twenty-seven other cases in their district showing the prevalence of embezzlement crimes. In conclusion, the State contends that the trial court properly denied alternative sentencing because Hodge lacked remorse and credibility, because her theft severely affected the hospital, and because confinement was necessary to provide deterrence and to avoid depreciating the seriousness of her offense.

> The trial court applied two enhancement factors to Hodge:
>
> (6) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great; and
>
> (15) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense[.]

T.C.A. § 40-35-114 (1997). The trial court did not apply any mitigating factors. See T.C.A. § 40-35-113 (1997). The trial court explained its reasoning for the sentence it imposed:

> Hodge stands before the Court, convicted of theft by embezzlement, a Class B felony.
>
> . . . .
>
> Because we are sentencing under the old law and because she is convicted of a Class B Felony, the defendant is not presumed to be a favorable candidate for alternative sentencing.
>
> . . . .
>
> The Court has to consider the circumstances of this particular offense, and will comment on that as we go through the sentencing.
>
> The Court is considering the lack of candor, the lack of truthfulness on the part of the victim of coming straight and accepting responsibility.
>
> The Court is also considering the potential, or lack of potential, for rehabilitation of this particular defendant.
>
> . . . .
>
> In addition to that, the Court finds, from the testimony at this sentencing hearing, as well as the victim impact statement, that the impact of this embezzlement has been great upon this hospital.
>
> . . . .
>
> The Court finds, and makes the finding for the record, that the State has carried its burden of proof under State v. Hooper that:
>
> No. 1, deterrence is needed in the community; and
>
> No. 2, that this defendant's incarceration would rationally serve as a deterrence to those similarly situated and likely to commit similar crimes.

> This Court feels it's been proven over the years – and these convictions start in 1999 – that probation, alone, does not serve as a deterrence to stealing.
>
> . . . .
>
> Clearly, clearly, there was a great amount of trust in Kim Hodge at the Crockett Hospital. And she defied that trust. And she defied that trust in a bolder way over the years. And, then, [she] comes in and gives an incredible, incredible testimony, at trial, that this Court could never accept in the face of overwhelming evidence to the contrary.
>
> On top of that, she shows no remorse and accepts no responsibility for her actions.
>
> Sentencing under the old law, the Court sentences Kim Hodge to a prison sentence of ten (10) years as a Range [I] standard offender, to serve.

On appeal, we must review issues regarding the length and manner of service of a sentence de novo with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d) (2006). Nevertheless, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The defendant, not the State, has the burden of showing the impropriety of the sentence. T.C.A. § 40-35-401(d) (2006), Sentencing Commission Comments. Because the record shows that the trial court considered the sentencing principles and all relevant facts and circumstances, our review is de novo with a presumption of correctness. See Ashby, 823 S.W.2d at 169.

Any sentence that does not involve complete confinement is an alternative sentence. See generally State v. Fields, 40 S.W.3d 435 (Tenn. 2001). A trial court, when sentencing a defendant or determining alternative sentencing, must consider the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
>
> (2) The presentence report;
>
> (3) The principles of sentencing and arguments as to sentencing alternatives;
>
> (4) The nature and characteristics of the criminal conduct involved;
>
> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114; and
>
> (6) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40-35-210(b) (1997); see also State v. Williams, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

A. Length of Sentence. We note that although Hodge made a general claim that her sentence was excessive, she did not make any arguments regarding the unconstitutional nature of her sentence under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). We further acknowledge that no waiver of Hodge's ex post facto protections is found in the record; therefore, her sentence is governed by the pre-2005 sentencing law.

On June 24, 2004, the United States Supreme Court held in Blakely v. Washington that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). However, on April 15, 2005, the Tennessee Supreme Court held that the Tennessee Criminal Sentencing Reform Act of 1989 did not violate a defendant's Sixth Amendment right to a jury trial. See State v. Gomez, 163 S.W.3d 632, 654-62 (Tenn. 2005) ("Gomez I"), vacated and remanded, Gomez v. Tennessee, 549 U.S. 1190, 127 S. Ct. 1209 (Feb. 20, 2007). On June 7, 2005, the Tennessee legislature passed a new sentencing law eradicating presumptive sentences and establishing advisory sentencing guidelines. A year and a half later, on January 22, 2007, the United States Supreme Court held that California's sentencing laws, which were very similar to Tennessee's pre-2005 sentencing act, violated the Sixth Amendment right to a jury trial, based on Blakely. See Cunningham v. California, 549 U.S. 270, 293, 127 S. Ct. 856, 871 (2007). On October 9, 2007, in light of Blakely and Cunningham, the Tennessee Supreme Court held that a defendant's Sixth Amendment right to a jury trial is not satisfied when a trial court enhances a defendant's sentence using factors that were not found by a jury. State v. Gomez, 239 S.W.3d 733, 741 (Tenn. 2007) ("Gomez II") (citing Cunningham v. California, 549 U.S. 270, 274, 127 S. Ct. 856, 860 (2007)). Recently, this court concluded that "[t]he presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant." State v. Phillip Blackburn, No. W2007-00061-CCA-R3-CD, 2008 WL 2368909, at *14 (Tenn. Crim. App., at Jackson, June 10, 2008), no cert. filed.

Because Hodge did not raise any Sixth Amendment issues regarding the enhancement factors at her sentencing hearing or on appeal, she is not entitled to plenary review. Instead, we may only review this issue for plain error. See Tenn. R. Crim. P. 52(b). "Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" United States v. Olano, 507 U.S. 725, 732, 113 S. Ct. 1770, 1776 (1993) (citations omitted). In Adkisson, this court stated that in order for an error to be considered plain:

(a) the record must clearly establish what occurred in the trial court;

(b) a clear and unequivocal rule of law must have been breached;

(c) a substantial right of the accused must have been adversely affected;

(d) the accused did not waive the issue for tactical reasons; and

(e) consideration of the error is "necessary to do substantial justice."

State v. Adkisson, 899 S.W.2d 626, 641- 42 (Tenn. Crim. App. 1994) (citations omitted).

As to factor (a), the record includes the presentence report, technical record, and transcripts from the pre-trial hearing, trial, and sentencing hearing, which make it clear that the trial court enhanced Hodge's sentence from the presumptive sentence of eight years to ten years for the theft conviction. We conclude that the record is sufficiently clear for our review. As to factor (b), a clear and unequivocal rule of law has been breached because the trial court applied enhancement factors in contravention of Blakely. As to factor (c), because the trial court applied two enhancement factors that were not found by a jury beyond a reasonable doubt, the defendant's substantial Sixth Amendment right to a jury trial was adversely affected. As to factor (d), the record does not indicate that Hodge waived this issue for tactical reasons. Finally, as to factor (e), we conclude that consideration of this error is necessary to do substantial justice. Hodge's sentence was not enhanced based upon a prior history of criminal convictions or her admissions at trial, and the trial court's enhancement of her sentence based on enhancement factors that were not Blakely-compliant caused her sentence to be increased from the presumptive sentence of eight years to ten years. See T.C.A. § 40-35-112(a)(2), -210(c) (1997). Therefore, it is appropriate to grant Hodge plain error relief by reducing the sentence for her Class B felony to the presumptive sentence of eight years.

B. Manner of Sentence. Hodge claims that the trial court erred in denying alternative sentencing. Tennessee Code Annotated section 40-35-102(6) (1997) states that a defendant who does not require confinement under subsection (5) and "who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Given that Hodge was convicted of a Class B felony, she is not entitled to the presumption that she is a favorable candidate for alternative sentencing.

A defendant is eligible for probation if the actual sentence imposed upon the defendant is eight years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. See T.C.A. § 40-35-303(a) (1997). The trial court shall automatically consider probation as a sentencing alternative for eligible defendants; however, the defendant bears the burden of proving his or her suitability for probation. T.C.A. § 40-35-303(b) (1997). In addition, "the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40-35-303(b) (1997), Sentencing Commission Comments. The trial court should consider the nature and circumstances of the offense, the defendant's criminal record, the defendant's background and social history, his present condition, including physical and mental condition, and the deterrent effect on the defendant when considering probation. See State v. Kendrick, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999) (citing State v. Grear, 568 S.W.2d 285 (Tenn. 1978)). In addition, the principles of

sentencing require the sentence to be "no greater than that deserved for the offense committed" and "the least severe measure necessary to achieve the purposes for which the sentence is imposed." T.C.A. § 40-35-103(2), (4) (1997). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the appropriate sentence. See T.C.A. § 40-35-103(5) (1997). Moreover, our supreme court has held that truthfulness "is certainly a factor which the court may consider" in deciding whether to grant or deny probation. State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983) (citations omitted). Although the trial court initially imposed a sentence of ten years, we modified Hodge's sentence to eight years, which makes her eligible for probation. See T.C.A. § 40-35-303(a) (1997). However, we place particular emphasis on the trial court's explanation that it was proper to deny alternative sentencing in this case:

> Even if this Court had sentenced Ms. Hodge to a sentence of eight (8) years, under the old law, and she were to get the advantage of the ten (10) year theory, under the new law, the Court, in considering the need for deterrence in these increasing embezzlement cases, and with the lack of responsibility and the lack of remorse on the part of Ms. Hodge before this Court, at all times, including the attempted plea, the Court finds that [it] would not grant alternative sentencing under either theory.

In determining whether a defendant should be required to serve a sentence of confinement, the trial court must consider if:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A) - (C) (1997). See also Ashby, 823 S.W.2d at 169.

In Hooper, the Tennessee Supreme Court held that a trial court could rely on deterrence alone to support a denial of probation or an alternative sentence:

> [W]e hold that a trial judge may sentence a defendant to a term of incarceration based solely on a need for deterrence when the record contains evidence which would enable a reasonable person to conclude that (1) deterrence is needed in the community, jurisdiction, or state; and (2) the defendant's incarceration may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes.

State v. Hooper, 29 S.W.3d 1, 13 (Tenn. 2000). The court recommended that a trial court consider factors, not limited to the following, when determining whether confinement is appropriate because of the need for deterrence:

> (1) Whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or in the state as a whole;
>
> (2) Whether the Defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain from the criminal behavior;
>
> (3) Whether the Defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case;
>
> (4) Whether the Defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective; and
>
> (5) Whether the Defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrests or convictions.

Id. at 10-12.

The record shows that the trial court considered the sentencing principles in Tennessee Code Annotated section 40-35-103 before denying alternative sentencing in this case. Despite Hodge's assertions that the trial court failed to consider the evidence regarding her propensity for rehabilitation and the negative effect of incarceration on her family, the record indicates that the trial court did consider this evidence before sentencing her. Although she contends that the trial court improperly considered her statements during the guilty plea hearing, the record indicates that she showed lack of remorse during her sentencing hearing as well, which was properly considered by the trial court. Regarding her assertion that the trial court erred by ordering confinement after taking judicial notice of other cases in the community wherein the majority of the defendants received a probationary sentence, this argument is unpersuasive because these cases helped the trial court determine whether confinement was necessary for the purpose of deterrence. See State v. Hooper, 29 S.W.3d 1, 13 (Tenn. 2000)

We note that Hodge was not entitled to a presumption that she was a favorable candidate for alternative sentencing. See T.C.A. § 40-35-102(6) (1997). In addition, although Hodge became eligible for probation when we modified her sentence from ten years to eight years, it is clear from the trial court's comments that it would not have granted an alternative sentence even if it had imposed a sentence of eight years. See T.C.A. § 40-35-303(a) (1997). Furthermore, it is clear that the trial court relied on both the need for deterrence and the seriousness of the offense in imposing a sentence of confinement. Agent Cox of the TBI testified that he had seen a large increase in the number of cases of embezzlement to which he was assigned, and the State admitted into evidence other cases of embezzlement in the community, which were closely inspected and considered by the

trial court. Hodge's conduct was intentional, motivated by a desire to profit from her offense, and took place over several years. The trial court determined that the impact of the embezzlement on Crockett Hospital was "great." In addition, the evidence showed that Hodge's case had received significant publicity and was being closely watched by the employees of the hospital as well as the individuals living in Lawrence County. Moreover, the trial court noted Hodge's lack of candor during her testimony. As we have previously stated, truthfulness is a factor that the court can consider in deciding whether to grant or deny probation. Bunch, 646 S.W.2d at 160. Given these facts, we conclude that the trial court properly determined that confinement was necessary to deter others and to avoid depreciating the seriousness of this offense.

Conclusion

We conclude that the evidence was sufficient to support Hodge's conviction and that the trial court did not err by denying her motion to suppress, motion to continue, or alternative sentencing. We further conclude that the trial court properly refused to allow counsel to question prospective jurors regarding the voluntariness of Hodge's statement. The remaining issues have been waived for failure to include the transcript of the motion for new trial on appeal or failure to appropriately refer to the record. The judgment of the trial court is affirmed in part, but we modify Hodge's sentence to a term of eight years to be served in the Tennessee Department of Correction.

_____
CAMILLE R. McMULLEN, JUDGE